

13 Jan 78

OLC
78-D134

FOIA

Gen

Comments: Impact of and Suggested Amendments to the
Freedom of Information Act

1. With several year's operating experience and the many reports made by the various components of the government to Congress such background should provide a serious consideration of the Congress to combine the FOIA and Privacy Act into a single statute. Obviously, the distinctive features of the objectives of the two laws would have to be preserved, but the burden of administration under a single law could be considerably lightened by providing for common or uniform exemptions, fees, time requirements, applicability and status of requesters, etc. A single statute would also ease reporting requirements, speed up processing, reduce paper work and aid in reducing confusion in the mind of the public for handling present requests under one act or another.

2. We have several specific instances where because of the FOIA cooperation has been diminished, refused or warnings issued.

a. A valuable and excellent independent contractor with the permission of his employer has found that his employer is exercising much more control over his activities with the Agency and the paper work or written records involved because of FOIA and recent exposures and releases.

b. A foreign intelligence service refused to participate in a joint operation because they feared that the knowledge of the operation "would leak out through Congress".

c. A highly placed foreign national asset made the following statements at a recent meeting where he showed his Agency contact a European news magazine containing information obviously obtained through the FOIA: "...your business depends upon the cooperation of people like me...right? How long do you think you will continue to get it...implying others as well as himself...if things like this continue to leak out?"

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3. The PA, intended to provide information on an individual, applies to U.S. citizens and resident aliens. Under the FOIA any person from any place in the world can request information. Access to information under FOIA should be limited to U.S. citizens and resident aliens. We feel that the USG has a responsibility to U.S. citizens, as taxpayers, but that responsibility does not extend to the rest of the world. We have not made an analysis of foreign FOIA requesters but we consider the fact that any foreigner can request information and our reply reveals a significant fact to the requester. The single situation where any stay-behind agent or cover agent receiving a reply from CIA even where information is denied reveals whether the agent has surfaced or is known to the CIA. The quantity and dates of denied documents reveals the extent of interest and the currency of the interest. Such information in the hands of a foreign service could enhance their operations, cause changes in their modis operandi, seek improvements in their cover arrangements and increase their confidence in their security, all of which directly hinders our CI efforts.

4. Although the FOIA does address the need for requests to be sufficiently specific for the materials desired to be identifiable, we find that many requests are so general in nature as to defy a clear understanding of what information the requester is after. For example, we have had requests for all material in our files on psychology, sociology, and other broad disciplines. Likewise, we have had requests for all materials in our files on behavior control--a term that means different things to different people, from relief of a headache through ingestion of aspirin to methods for trying to coerce someone into doing something against his will or in violation of his moral code. The problem then is one of having the law better define the degree of specificity required from the requester.

5. Related to the above in the amount of time spent searching for materials requested when we are virtually certain our files contain nothing pertinent; but to satisfy both the spirit and letter of the law, we conduct a search on the remote chance that something might turn up. This situation of devoting search effort to fruitless searches is exacerbated by the fact that broad requests are broadly disseminated to potential holders, thus leading to receipt of requests for materials on subjects totally outside of our responsibility.

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6. The FOIA does not limit the number of topical items that can be included in a single request. Thus it is not uncommon to receive requests, either general or specific in their description of what is desired, that literally ask for everything about everything in the files. A revision of the law to limit the number of topical items per request would shorten search times and permit more orderliness in processing as well as in record keeping. Such a provision could help in meeting the severe time requirements for responding to requesters which in turn might reduce the number of appeals and litigations that are so time consuming and costly.

7. We are concerned with the inconsistencies between the FOI and Privacy Acts. Our particular concern relates to the protection of the privacy of individuals or small business entities with whom we have contractual associations. Although these individuals and entities are in fact intelligence sources and methods, they do not fit neatly into the (b)(3) category of exemptions nor do they fall clearly under exemption (b)(6). This neither "fish nor fowl" situation is particularly cumbersome in those instances where the work being done is unclassified and the Agency has no objection to the contractor sharing his work with the public so long as there is no acknowledgement of Agency interest. This situation is common because for the most part the involved technologies are not classified but their application to intelligence activities is sensitive and therefore classified. Insofar as possible, we like to share the technical knowledge with the public and at the same time insure that those who deserve it get credit. A problem arises, however, when a contractor, for example, a particularly well known individual or entity, publishes in a professional journal and subsequently we receive an FOIA request for all of our file materials which relate to a topic that happens to include the project of the publication. Such requests for unclassified material normally could be answered by releasing the material requested. However, in those cases where the association is classified, either to protect intelligence interests or the privacy of the individual or entity, release of the material would compromise the classified association. The risk of compromise is particularly acute when the contracting entity is well known and the requester is knowledgeable. The FOIA does not, but should, provide for situations of this kind, perhaps by incorporating a provision for neither confirming nor denying associations. Obviously, such a provision would have to be usable in situations other than those in which there was an association that cannot be acknowledged, or its use would soon be tantamount to confirming an association.

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8. FOIA exemptions:

(b)(1)(A) Specifically authorized under criteria established by an EO to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such EO.

We believe that the wording in the new EO is more explicit and more clearly covers the documents classified by the CIA. As a result the word "defense" should be changed to "security".

It should be noted that both (A) and (B) conditions must be met for this exemption.

The new EO states that "classified information" is official information which has been determined by proper authority to require a degree of protection against unauthorized disclosure in the interest of national security and is so designated. Within the government the terms "national defense" and "national security" become interchangeable, mixed, and synonymous, but in a court of law or statute true or correct meanings must be recognized.

9. We believe that the FOIA should recognize the fact that the content of some file materials may be inaccurate or untrue. Similarly, raw data or opinions contained among file materials may be misleading and if cited could create false impressions prejudicial to U.S. Government interests.

10. FOIA requires a response within 10 working days and allows extension of additional 10 working days.

We believe a more reasonable time should be provided for the response.

Although we cannot document the Agency's record for responses, we consider the physical handling of a request from the time the request is first opened in IPS to the time the request arrives in the hands of knowledgeable personnel who will conduct a search, will completely consume the original 10 days limit. The search, review, preparation of documents and physical return of a reply to IPS could easily consume the extension of the additional 10 days. It is important to stress to the Congress that

the files of the CIA are labeled and filed to meet the mission of respective offices, it is not possible to find one file in the Agency on an individual or a specific subject which will contain everything the Agency has on an individual or topic.

11. The FOIA should specifically address the issue of Federal vs. State freedom of information and privacy laws so that there is no question as to which takes precedence in the event the requester elects to seek information from both Federal and State sources.

12. We recommend the FOIA be amended so that requesters pay more of the actual costs of processing the requests. Under the current law only search time and copy costs are chargeable--at low rates--and there are numerous provisions for waiver of those. In fact, the review and processing is usually more costly because these activities are significantly more time consuming and involve making multiple copies of all documents reviewed. This is particularly true of documents that must be sanitized or that require coordination by other entities prior to being released.

DD/S&TA 001-77

OLC 77-5748
30 December 1977

MEMORANDUM FOR: Morning Meeting Participants

FROM: George L. Cary
Legislative Counsel

SUBJECT: Amendments to the Freedom of
Information Act

1. (C) In a recent meeting with the Chairman of the Senate Select Committee on Intelligence, the Director expressed serious concern about the impact of the Freedom of Information Act on Agency activities, not only from the standpoint of the man-hours involved in record searches, reviews, appeals and litigation, but more importantly from the standpoint of the impact which FOIA disclosures were having in the aggregate on our relationships with foreign intelligence services and cooperating individuals.

2. (C) Chairman Inouye was both sympathetic and receptive to the Director's concerns and suggested that we draft proposed amendments to the Freedom of Information Act which might resolve some of these problems. This office is currently assessing the impact of FOIA and working on possible amendatory language. An essential part of this process is the argumentation to go with amendatory language stating the impact of the FOIA and giving examples of the difficulties which we have experienced as a result of it.

3. (C) I am aware that there are some differences of opinion as to whether or not FOIA has in fact has a negative or harmful impact on Agency activities and operations. With this in mind I would appreciate receiving your comments and suggestions plus any documentation you can give on your position on this subject by 15 January 1978.

[Redacted Signature Box]

George L. Cary

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2-... Signed

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Approved For Release 2005/01/06 : CIA-RDP81M00980R000200010056-8

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Amendments to the Freedom of Information Act

FROM:

Ernest J. Zellmer, ADD/S&T
6E60, Hqs.

EXTENSION

NO. OLC 77-5748

DDS&T-001-78

DATE

13 January 1978

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. George Cary, OLC
6C19, Hqs.

Attached are DDS&T's comments on subject request.

Ernest J. Zellmer
ADD/S&T